

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 353 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

AHMEDSHARIF ISMAIL CHIKHALIYA

Versus

STATE OF GUJARAT

Appearance:

MR SAURIN A SHAH for Petitioner
MR BD DESAI, APP for Respondent

CORAM : MR.JUSTICE H.R.SHELAT
and
MR.JUSTICE J.R.VORA

Date of decision: 17/02/2000

ORAL JUDGEMENT : [Per: Vora, J.]

1. This appeal is preferred by original accused in

Session Case No. 33 of 1989 in the Court of Sessions, Valsad at Navasari. The appellant was convicted by the learned Addl. Sessions Judge, Valsad, for the offences punishable under Sec. 20(B)(2) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act"). Being aggrieved, the appellant accused has filed this Appeal.

2. Necessary facts leading to the present prosecution and appeal are as under :

On 4th November, 1988, Valsad City Police Station Police Inspector Mr. Pitambardas Virumal Asanani at about 6.00 p.m. received an information that Ahmedsharif Ismail Chikhaliya i.e. the present appellant residing at Taiwad Pan-ni-wad at Valsad was illegally possessing charas for selling. Therefore, at 2115 hours, he called two panchas and with other police officials, Mr. Asanani, P.I. raided the house of the appellant. The appellant was present. He disclosed his identity and from his residence some pieces of charas about 28 grams were found and seized. A Panchnama for seizing the charas was prepared. Complaint was also filed by Mr. P.V. Asanani. He investigated the case and charge sheet was submitted before the learned JMFC, Valsad, who in turn committed the case to the Court of Sessions as the Court of Sessions was competent to try the offences. The case was numbered as Session Case No. 33 of 1989. After full fledged trial, learned Addl. Sessions Judge, Valsad, came to the conclusion that the prosecution successfully established the charges levelled against the appellant for Sec. 20(B)(2) of the NDPS Act. Therefore, he sentenced the appellant for rigorous imprisonment of 10 years and fine of Rs. 1 lac and in default to undergo rigorous imprisonment for 1 year. Against the decision of the learned Addl. Sessions Judge, Valsad at Navasari dated 25.3.1994, the present Appeal is preferred by the original accused.

3. Learned Advocate Mr. Saurin Shah on behalf of the appellant while learned APP Mr. B.D. Desai for the State were heard. Learned Advocate Mr. Shah on behalf of the appellant restricted his argument to the law points emerges for the consideration in this Appeal. He urged that the mandatory provision as envisaged by Section 41(2) and Section 42(1) has not been complied with by the raiding PI. He drew our attention to the deposition of the complainant PI Mr. Asanani, who has stated that he recorded on a paper that he did not obtain order for the search because the information was likely to be leaked and consequently the accused it comes to

know about this, he was likely to conceal the muddamal and there was likelihood of absconding of the accused. Mr. Shah, learned Advocate for the appellant urged that this is not the compliance under Section 41(2) or Section 42(2) of the NDPS Act. He urged that both the sections categorically states that the raiding Officer is required to reduce the information which he receives into writing and having regard to the deposition of Mr. Asanani, it is his clear admission that he had received information that the accused was dealing in charas. Mr. Shah urged that the prosecution has not established that Mr. Asanani reduced this information in writing and hence that was a clear breach of Sections 41(2) and 42(1) and according to the ratio laid down by the Apex Court in the case of BALBIR SINGH vs. STATE OF PUNJAB, reported in 1994 SCC (Cri) 634 : AIR 1994 SC 969, non-compliance vitiates the trial and accused is entitled to acquittal. Mr. Shah urged that therefore, the learned Addl. Sessions Judge, Valsad at Navasari erred in convicting the present appellant.

4. On the other hand, Mr. Desai, learned APP vehemently contended that the only fact which the prosecution is required to prove is that whether information was reduced to writing. He also draw our attention to the deposition of Mr. Asanani wherein he has stated that he made a note for the reasons for not obtaining the warrant for search. Mr. Desai also urged that Mr. Asanani has also stated in his deposition that he has deposed that ordinarily in case dairy all the details are required to be mentioned. Mr. Desai also urged that therefore this should be taken to be due compliance of Sections 41(2) and 42(1) of the NDPS Act because the concerned Police Inspector must have recorded this information in his case dairy.

5. From the rival contentions, the law point, which surfaces to be determined, which goes to the root of the prosecution, is whether there was due compliance of Section 41(2) and Section 42(1) of the NDPS Act, and that both the provisions are mandatory that breach of the same would vitiate the trial.

6. Reverting back to the facts of the case and taking into consideration the deposition of Mr. Asanani at Exh.14, it is clear that he has deposed that he made notes regarding reasons for not obtaining the warrant for search the residence of the accused. He deposed that there was likelihood of the leakage of the information which consequently result into absconding of the accused and concealing of the muddamal. He has also deposed that

ordinarily these facts are mentioned in the case dairy and attempt is made on behalf of the prosecution that this be treated as due compliance of the provisions.

7. Drug trafficking and drug addictions are heinous crime not only devastating individuals but affect the society at large. Therefore, mere possession of illicit articles has been made a serious offence under the NDPS Act. On establishing a charge, rigorous punishment of minimum of 10 years sentence and a fine of Rs. 1 lac is provided. At the same time, paramount consideration of liberty to the citizen and fair trial to the accused, must not be lost sight of and, therefore, some provisions have been made in the NDPS Act, which are required to be adhered to by the Investigating Agency very strictly. One of the provisions, which we are concerned is under Sections 41 (2) and 42(1) of the NDPS Act. Both the provisions are mandatory to the extent that Investigating Agencies are obliged to record and reduce in writing the information which it receives. This is not an empty formality but a safety and protection guaranteed to the accused. This just, fair and reasonable provision is made to afford credibility to the evidence of the prosecution having regard to the seriousness of the nature of the crime and the magnitude of the punishment provided for.

8. Therefore, in the case of Balbir Singh vs. State of Punjab (supra), it has been held that both the provisions i.e. under Sections 41(2) and 42(1) are mandatory provisions and mere breach would vitiate the trial.

9. This is so because if this fair and just provisions are not adhered to by the Investigating Agency, no reliance can be placed on the evidence of the prosecution.

10. Now, therefore, it is clear that no where in the evidence, it has been established that the information which Mr. Asanani, PI, received was reduced into writing. Whatever, he has stated are reasons for not obtaining warrant for the search. This must not be treated as due compliance of the provisions under Sections 41(2) and 42(1) of the NDPS Act, wherein categorical requirement is to reduce the information in writing. There is no whisper regarding this in the prosecution evidence, giving rise to the only inescapable conclusion that the required mandatory provision for reducing the information in writing was not adhered to, which renders the prosecution bad.

11. In this view of the matter, the prosecution fails on this count alone and, therefore, we do not require to consider each details and facts in this case. The breach of the mandatory provision results in vitiating the trial which entitles the accused for acquittal.

12. In the result, this Appeal is allowed. The judgment and order dated 25.3.1994 of the learned Addl. Sessions Judge, Valsad at Navsari in Session Case No. 33/1989 convicting the accused - Appellant for the charges under Sec. 20(B)(2) of the Narcotics Drugs and Psychotropics Substances Act, 1985 is reversed and set aside. The accused - appellant is hereby acquitted of all the charges levelled against him. Appellant accused is on bail, his bail bond is ordered to be cancelled. While granting bail to the appellant, this court had directed the appellant to deposit Rs.2,000/- in cash with the Registry. Hence, Registry is directed to refund the said amount to the appellant.

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